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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 778

LOCAL 1377 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Petitioner,

vs.

HEIN-WERNER CORP., a Wisconsin Corporation, and HENRY E. CLARK, EDWIN WEGNER, RALPH N. LINGELBACH, JACK W. CADIEU, GORDON W. MAXWELL, ERWIN R. LEE, ANTHONY J. PADWIN, W. C. MELZER, STANLEY S. STRUCK, HARVEY E. KNIPPEL, KARL PFAEHLER, CLYDE W. BECKMAN, FRED WALTHER, RALPH J. SUMPTER, WALLACE S. HILL, and DARWIN BURNETT,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Wisconsin.

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INDEX.

	Page
Citations to opinions below	2
Jurisdiction	2
Question presented	2
Constitutional provisions involved	3
Statement	3
How federal questions are presented	6
Reasons for granting writ	7
Conclusion	13

Cases Cited.

Amalgamated Association v. Wisconsin Board, 340 U. S. 383	7
Arundel Corp., 59 N. L. R. B. 505	8
Carroll's Transfer Co., 56 N. L. R. B. 935	11
J. I. Case Co. v. N. L. R. B., 321 U. S. 332, 338	12
Cities Service Oil Co., 25 N. L. R. B. 36, enf'd. 122 F. 2d 149 (C. A. 2)	8
Consolidated Aircraft Corp., 47 N. L. R. B. 694, modified and enforced, 141 F. 2d 785, 787 (C. A. 9)	7, 9, 11
Crown Zellerbach Corp., 95 N. L. R. B. 753	7, 9
Ford Motor Co. v. Huffman, 345 U. S. 330	11
Garner v. Teamsters, 346 U. S. 485	9
Louis Hornick Co., 2 N. L. R. B. 983	11
Hughes Tool Co., 104 N. L. R. B. 318	10
Hughes Tool Co. v. N. L. R. B., 147 F. 2d 69, 73 (C. A. 5), enforcing as modified, 56 N. L. R. B. 981, 992	7, 10 12
Local Union No. 89 v. American Tobacco Co., 348 U. S. 978	9

Local Union 25 v. New York-New Haven Railroad, 350 U. S. 155, 161 10

McCrary v. Aladdin Radio Industries, 355 U. S. 8 9
McDonnell Aircraft Corp., 109 N. L. R. B. 930 ..... 7, 9
Alexander Milburn Co., 62 N. L. R. B. 482 11

N. L. R. B. v. Bachelder, 120 F. 2d 574, 577-578 (C. A. 7) enforcing, 21 N. L. R. B. No. 91 11
N. L. R. B. v. Hearst Publications, 322 U. S. 111, 130 10
N. L. R. B. v. Highland Shoe, Inc., 119 F. 2d 248, 222 (C. A. 1), affirming 23 N. L. R. B. No. 23 11
N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 342 ..... 11, 12
National Licorice Co. v. N. L. R. B., 309 U. S. 350, 358 12

Progressive Kitchen Equipment Co., 123 N. L. R. B. No. 121 10

Radio Officers v. N. L. R. B., 347 U. S. 17, 37-38, affirming, 197 F. 2d 719 (C. A. 2), enforcing 93 N. L. R. B. 299 10
Rapid Roller Co. v. N. L. R. B., 126 F. 2d 452, 459, (C. A. 7), affirming 33 N. L. R. B. No. 8 11

San Diego Building Trades Council v. Garmon, 359 U. S. 236 9
A. O. Smith Corp., 119 N. L. R. B. 621 10

Teamsters v. Kerrigan Iron Works, 353 U. S. 968 9
Teamsters v. Oliver, 358 U. S. 283 7
Textile Workers v. Lincoln Mills, 353 U. S. 448, 455 8
Timken Roller Bearing Co. v. N. L. R. B., 161 F. 2d 949, 954 (C. A. 6), reversing 70 N. L. R. B. 500 12

United Auto Workers v. O'Brien, 339 U. S. 454 8
United Mine Workers v. Arkansas Oak Flooring Co., 351 U. S. 52 8
U. S. Automatic Corp., 57 N. L. R. B. 124 ..... 8, 11

Weber v. Anheuser-Busch, 348 U. S. 468, 478-479 ..... 7, 10

Statutes Cited.

Sections 7 and 8 of the National Labor Relations Act 9, 10, 11
Sections 8 (d) and 9 (a) of the National Labor Relations Act 7, 11, 12
Section 8 (a) (5) of the National Labor Relations Act 11, 12
Section 8 (b) (3) of the National Labor Relations Act 12
Section 301 (a) of the National Labor Relations Act .. 9
28 U. S. C., Section 1257 (3) 2
29 U. S. C., Section 141 et seq. 2

Constitution Cited.

Article I, Section 8 and Article VI, Section 2 of the United States Constitution 3

Periodicals Cited.

63 Harv. L. Rev. 1097 11
Vol. 76, Monthly Labor Review No. 3 8
Vol. 83, Monthly Labor Review No. 1 8

Appendices.

A—Opinion of Wisconsin Supreme Court denying motion for rehearing 14
B—Majority and dissenting opinions of Wisconsin Supreme Court 16
C—Opinion and judgment of Waukesha County Circuit Court 29
D—Article I, Section 8 and Article VI, Section 2 36

IN THE

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OCTOBER TERM, 1959.

No. .....

LOCAL 1377 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Petitioner,

vs.

HEIN-WERNER CORP., a Wisconsin Corporation, and HENRY E. CLARK, EDWIN WEGNER, RALPH N. LINGELBACH, JACK W. CADIEU, GORDON W. MAXWELL, ERWIN R. LEE, ANTHONY J. PADWIN, W. C. MELZER, STANLEY STRUCK, HARVEY E. KNIPPEL, KARL PFAEHLER, CLYDE W. BECKMAN, FRED WALTHER, RALPH J. SUMPTER, WALLACE S. HILL, and DARWIN BURNETT,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Wisconsin.

Petitioner prays that a Writ of Certiorari issue to review the final judgment of the Wisconsin Supreme Court entered in the above entitled case on January 5, 1960. The original decision of the Wisconsin Supreme Court was

entered on November 3, 1959. Timely motion for rehearing was made to the Wisconsin Supreme Court on November 20, 1959; and on January 5, 1960, the Wisconsin Supreme Court denied the motion for rehearing.

CITATIONS TO OPINIONS BELOW.

The Wisconsin Supreme Court's opinion denying motion for rehearing is reported in Volume 8, Wisconsin 2d Advance Sheets No. 7, pp. 277-277b, 100 N. W. 2d 317. This opinion is printed in Appendix A, *infra*, pp. 14-15. The original decision of the Wisconsin Supreme Court and dissenting opinion are officially reported at 8 Wis. 2d 264, 99 N. W. 2d 132, and are printed in Appendix B, *infra*, pp. 16-28. The decision and judgment of the Circuit Court of Waukesha County are not officially reported and are printed in Appendix C, *infra*, pp. 29-35.

JURISDICTION.

The Wisconsin Supreme Court on January 5, 1960, issued its final judgment after motion for rehearing. The denial of the motion and the original decision on November 3, 1959 was predicated on the grounds that the Labor Management Relations Act of 1947, as amended, 29 U. S. C., Section 141 *et seq.*, did not control the case at bar. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTION PRESENTED.

Does a state court have jurisdiction to enjoin the operation of, or to declare illegal under state law, an agreement and arbitration award between an interstate employer and a union representing its employees, under which agreement grievances arising thereunder are finally determined by arbitration between the employer and union.

in view of the fact that the relationship between the employer and union and the subject matter over which they are required to bargain must be determined by application of the Labor Management Relations Act of 1947.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8, and Article VI, Section 2 of the United States Constitution. They are printed in Appendix D, *infra*, pp. 36-38.

STATEMENT.

(Record references "R" refer to the record filed by Petitioner pursuant to Rule 21, paragraph 3.)

Petitioner Local 1377, International Association of Machinists, A. F. L.-C. I. O. is a labor union representing the maintenance and production employees of the Hein-Werner Corporation[1] (R. 113). The employer is a Wisconsin corporation and operates a factory in the City of Waukesha, Wisconsin. The Hein-Werner Corporation is engaged in interstate commerce within the meaning of the Labor Management Relations Act of 1947, as amended (R. 114).

On October 22, 1956, the employer and union entered into a collective bargaining contract effective September 18, 1956 to September 18, 1959 (Pl. Ex. 1, R. 115-119). There was included in such contract a provision for handling grievances and for final disposition of these griev-

[1] Hein-Werner Corporation did not participate in any manner before the Wisconsin Supreme Court. Though appearing by counsel before the Waukesha County Circuit Court, the employer filed no answer and did not argue nor file a brief in the trial court. Because the employer will be bound by any determination of this Court, the employer is made a party Respondent.

ances by arbitration between the employer and union (R. 116-118).

In September, 1957 a grievance arose concerning seniority of four employees who had been laid off when certain supervisory employees were demoted from their supervisory positions and transferred back into the bargaining unit (Pl. Ex. 2, R. 126-127). Such supervisory employees had originally held non-supervisory positions in the bargaining unit before promotion to supervisory positions.

The question raised by the grievance was whether such former supervisory employees had continuous seniority measured from the date they had entered the service of the company, or whether there should be excluded from such period of continuous service the time they had spent in their supervisory positions. The company interpreted the contract to give continuous seniority, while the union contended that the latter was the correct interpretation.

The grievance was processed in accordance with the grievance procedure stated in the contract and it resulted in arbitration before a single arbitrator. Prior to such arbitration, the employees in the bargaining unit authorized the union to proceed to arbitration (R. 114). The employer and union presented evidence and witnesses before the arbitrator. None of the demoted supervisory employees (nor other employees in the bargaining unit) were notified of the time and place of hearing, and none were present or participated in the arbitration hearing.

On March 19, 1958, the arbitrator made his award which upheld the union's position of the seniority provisions of the agreement (R. 128-129). Subsequent to the award, a meeting of the employees was held at which it was determined that no change would be made in seniority as set forth in the award. All Respondent employees par-

ticipated in this meeting (R. 115). Thereafter the employer changed the seniority list and proceeded to pay some employees in accordance with the award.

Prior to June 3, 1958, a disagreement arose between the company and union that a number of employees had not been paid in accordance with the award (R. 115). The company offered to pay the employees pursuant to the union's request if the union would agree to give continuous seniority to the Respondent employees. This proposal was rejected at another meeting of employees in the bargaining unit (R. 115).

There were twenty-nine supervisory employees adversely affected by the award; sixteen of these employees brought this suit against the company and union to restrain enforcement of the award. These employees are Respondents here and at the time of suit were members of the union.

Basis for the action by Respondent employees was that the arbitrator had exceeded his jurisdiction (R. 111-112).

The petitioner's answer in the Circuit Court of Waukesha County denied that the arbitrator overstepped his jurisdiction in making the award, and, in addition to this denial, raised several constitutional defenses going to the jurisdiction of the state court (R. 112-113).

During argument the Petitioner asserted that the subject matter of the action was within the exclusive jurisdiction of the National Labor Relations Board (Hereinafter referred to as the "Board"). Petitioner further asserted that commencement of the action was in derogation of its rights and duties as exclusive bargaining agent and interferred with the right to bargain collectively, both protected by the National Labor Relations Act.

The Circuit Court of Waukesha County determined that it has jurisdiction over both the parties and the subject

matter of the controversy. Though the question was never raised by the pleadings, the Circuit Court decided that because the demoted supervisors received neither formal notice of nor were participants in the arbitration hearing, they were deprived of due process under the Constitution.

Petitioner renewed its objections to assertion of jurisdiction by the state court and again asserted its claim of pre-emption as it affected the right to bargain as exclusive representative under federal law before the Wisconsin Supreme Court. In addition, the petitioner asserted that the notice and participation required by the Circuit Court was a further invasion of both the employees and union's federally pre-empted right to negotiate conditions of employment. The Wisconsin Supreme Court rejected the argument that the Board had exclusive jurisdiction, and further determined on January 5, 1960, that its judgment did not interfere with the rights of the union to bargain collectively as exclusive representative under the National Labor Relations Act. The Wisconsin Supreme Court affirmed the judgment of permanent injunction against the union and company in enforcing the award. It is to review this final judgment that this Petition is submitted.

HOW FEDERAL QUESTIONS ARE PRESENTED.

Petitioner's answer in the Circuit Court of Waukesha County affirmatively alleged the pre-emptive character of the National Labor Relations Act and constitutional objections to assertion of state jurisdiction relied upon in this Petition (R. 112-113). These arguments were briefed and argued before both the Waukesha County Circuit Court and before the Wisconsin Supreme Court. The Wisconsin Supreme Court initially determined one of the constitutional objections relating to jurisdiction of the National Labor Relations Board; on January 5, 1960, that Court on motion for rehearing determined that the other constitutional objections were without merit.

REASONS FOR GRANTING THE WRIT.

1. Contrary to the decisions of this Court, in **Teamsters v. Oliver**, 358 U. S. 283, **Weber v. Anheuser-Busch**, 348 U. S. 468, and **Amalgamated Association v. Wisconsin Board**, 340 U. S. 383, the Wisconsin courts asserted original jurisdiction to determine whether the arbitration clause in the collective agreement was an appropriate subject for bargaining under Sections 8 (d) and 9 (a) of the National Labor Relations Act. The Wisconsin Supreme Court recognized that Respondent employees had no right under the arbitration clause of the contract to notice or to participate in the arbitration hearing. (App. B, *infra*, p. 20.) In its decision the Wisconsin Supreme Court has either prohibited union-employer contracts excluding notice to and participation of individual employees, or alternatively, stated that even though the company and union negotiate a contract precluding individual notice and participation, such agreement is contrary to state policy.

In the **Oliver Case** this Court observed that state policy could not apply to limit "the solution that the parties' agreement can provide to the problem of wages and working conditions." 358 U. S. at 295. The conflicts in the **Oliver Case** and **Amalgamated Case** are identical to the conflict in the case at bar. In each of the cited cases, state statutes interfered with an affirmative duty to bargain imposed by the Board under the Federal Act. In the instant case the conflict arises out of state court decision establishing a new "labor policy" rather than state statute. The conflict here is none the less apparent. The Board has held that an employer is under an affirmative duty to bargain a contractual grievance and arbitration procedure. **Consolidated Aircraft Corp.**, 47 N. L. R. B. 694; **Crown Zellerbach Corp.**, 95 N. L. R. B. 753; **McDonnell Aircraft Corp.**, 109 N. L. R. B. 930; **Hughes Tool Co. v. N. L. R. B.**,

147 F. 2d 69, 73 (C. A. 5); enforcing as modified, 56 N. L. R. B. 981, 992; **Cities Service Oil Co.**, 25 N. L. R. B. 36, **enf'd** 122 F. 2d 149 (C. A. 2); **U. S. Automatic Corp.**, 57 N. L. R. B. 124; **Arundel Corp.**, 59 N. L. R. B. 505. Notwithstanding the foregoing, the Courts below enjoined enforcement of an arbitration award because the parties to the contract had complied with the arbitration clause previously negotiated by them.

There are 18 million employees covered by over 150,000 collective bargaining contracts.[2] More than 90% of collective bargaining agreements in the United States provide for arbitration between the employer and union as parties.[3] If, as the Wisconsin courts held, the states are free to determine whether a contractual arbitration clause is valid, then the status of the agreement under federal law may vary from one state to another. If the agreement to arbitrate is the *quid pro quo* for the union relinquishing the right to strike during the agreement, **Textile Workers v. Lincoln Mills**, 353 U. S. 448, 455, then widespread industrial unrest can be the only result of allowing each state to determine the validity of the arbitration clause of the contract.[4]

Every state court judgment invalidating provisions in collective bargaining agreements with interstate employ-

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[2] *Monthly Labor Review*, Vol. 83, No. 1, p. 9. January, 1960. U. S. Dept. of Labor, Bureau of Labor Statistics.

[3] *Monthly Labor Review*, Vol. 76, No. 3, p. 261. March, 1953. U. S. Dept. of Labor, Bureau of Labor Statistics.

[4] Since the judgment enjoins Petitioner from enforcing the award, it must be assumed that a strike to compel compliance with such award would fall within the prohibition of the injunction. In fact, the contract specifically reserves the union's right to strike if the employer does not comply with the award within 15 days (R 118). Yet, this Court has held repeatedly that such strikes are immune from state restraint. *See, e. g.: United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62; *United Auto Workers v. O'Brien*, 339 U. S. 454.

ers reaching this Court has been reversed. **Local Union No. 89 v. American Tobacco Co.**, 348 U. S. 978; **Teamsters v. Kerrigan Iron Works**, 353 U. S. 968; **McCrary v. Aladdin Radio Industries**, 355 U. S. 8. The Wisconsin courts by asserting jurisdiction to determine what constitutes an appropriate subject for collective bargaining have, in direct conflict with the previous decisions of this Court, invaded an area reserved by Congress to the Board.

2. Contrary to the decisions of this Court in **San Diego Building Trades Council v. Garmon**, 359 U. S. 236, and **Garner v. Teamsters**, 346 U. S. 485, the Wisconsin courts asserted jurisdiction over matters which had been confided by Congress to the Board. The Wisconsin Supreme Court determined that the Board had no jurisdiction because the case at bar did not involve an unfair labor practice under the Federal Act.[3] In the same opinion, however, the court asserted that the union had not fairly represented all employees in the bargaining unit; and, at the same time, invalidated the contractual arbitration clause by enjoining enforcement of an award because individual employees received no formal notice of nor were participants in the arbitration hearing.

The activities outlawed by the Wisconsin courts are arguably subject to both the protection of Section 7 and prohibition of Section 8 of the federal Act. Section 7 protects the right to bargain collectively with respect to wages, hours and other conditions of employment. Negotiations of a contract containing grievance and arbitration procedure is protected activity. **Consolidated Aircraft Corp.**, 47 N. L. R. B. 694; **Crown Zellerbach Corp.**, 95 N. L. R. B. 753; **McDonnell Aircraft Corp.**, 109 N. L. R. B.

[3] The Wisconsin Supreme Court mistakenly viewed the case at bar as falling within Section 301 (a) of the federal Act. The action, however, was commenced by individual employees to restrain both employer and union from enforcing an award.

930; **Hughes Tool Co.**, 56 N. L. R. B. 981, **modified and enforced**, 147 F. 2d 69, 73 (C. A. 5). The application of protected activities defined in Section 7 is necessarily the exclusive task of the Board. In invalidating the arbitration clause of the collective contract, the Wisconsin courts have demonstrated clearly the danger of state interference with national policy.

The necessity for a single interpretation is underscored by the opinions of the courts below which evidenced a preoccupation with Petitioner's duty as bargaining agent to fairly represent Respondent employees. In enunciating its own labor policy, the Wisconsin Supreme Court held that though the collective contract provided otherwise, Respondent employees were entitled to notice of and participation in the arbitration hearing. If Petitioner in complying with its contractual obligations has not fairly represented Respondent employees, then Petitioner may arguably be guilty of activity prohibited by Section 8. The Board has held, and courts affirmed, that unions must fairly represent all employees in the bargaining unit. **Radio Officers v. N. L. R. B.**, 347 U. S. 17, 37-38, **affirming** 197 F. 2d 719 (C. A. 2) **enforcing** 93 N. L. R. B. 299; **A. O. Smith Corp.**, 119 N. L. R. B. 621; **Progressive Kitchen Equipment Co.**, 123 N. L. R. B. No. 121; **Hughes Tool Co.**, 104 N. L. R. B. 318.

This Court has itself refrained from construing the federal Act prior to original construction by the Board. **N. L. R. B. v. Hearst Publications**, 322 U. S. 111, 130; **Weber v. Anheuser-Busch**, 348 U. S. 468, 478-479; **Local Union 25 v. New York-New Haven Railroad**, 350 U. S. 155, 161. The Wisconsin courts in the case at bar have limited activity arguably protected under Section 7, and have limited activity arguably prohibited by Section 8. Wisconsin by applying state concepts to a situation involving a collective bargaining relationship between a union and

interstate employer covered by the National Labor Relations Act, has violated the Supremacy Clause of the Constitution and is in direct conflict with decisions of this Court.

3. The decision of the Wisconsin Supreme Court interferes with rights guaranteed and obligations imposed by Sections 8 (d) and 9 (a) of the federal Act. In its decision the Wisconsin court held that once the collective agreement had been negotiated and executed, the collective bargaining process terminated concomitantly with the union's right of exclusive representation (App. A, p. 15). Contract negotiations are the legislative process of collective bargaining; the day to day working out of plant problems is its administrative or judicial aspect. Wisconsin recognized the legislative function of collective bargaining, **Ford Motor Co. v. Huffman**, 345 U. S. 330, but refused to recognize the continuing nature of the collective bargaining relationship. Both the Board and courts have consistently recognized this continuing relationship in holding that it is a violation of Section 8 (a) (5) of the federal Act for an employer to refuse to discuss grievances and questions of contract interpretation with the bargaining agent. **N. L. R. B. v. Sands Mfg. Co.**, 306 U. S. 332, 342; **N. L. R. B. v. Bachelder**, 120 F. 2d 574, 577-578 (C. A. 7), **enforcing** 21 N. L. R. B. No. 91; **N. L. R. B. v. Highland Shoe, Inc.**, 119 F. 2d 218, 222 (C. A. 1), **enforcing** 23 N. L. R. B. No. 23; **Rapid Roller Co. v. N. L. R. B.**, 126 F. 2d 452, 459 (C. A. 7), **affirming** 33 N. L. R. B. No. 8; **Louis Hornick Co.**, 2 N. L. R. B. 983; **Consolidated Aircraft Corp.**, 47 N. L. R. B. 694, **modified and enforced**, 141 F. 2d 785, 787 (C. A. 9); **U. S. Automatic Corp.**, 57 N. L. R. B. 124; **Alexander Milburn Co.**, 62 N. L. R. B. 482; **cf. Carroll's Transfer Co.**, 56 N. L. R. B. 935.[6]

[6] See also: Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097

In the case at bar, the employer and union meet their statutory duty to bargain under the federal Act by providing for arbitration of unresolved grievances in the contract and by proceeding to arbitration in accordance therewith. **Timken Roller Bearing Co. v. N. L. R. B.**, 161 F. 2d 949, 954 (C. A. 6), **reversing** 70 N. L. R. B. 500. An award was rendered and a question of interpretation of contract resolved which affected all employees in the bargaining unit. By enjoining enforcement of the award and invalidating the arbitration provision of the contract, the Wisconsin court has emasculated the duties of the employer and union to bargain collectively prescribed under Sections 8 (d) and 9 (a) of the federal Act.

The judgment of the Wisconsin courts requiring notice to and participation in the arbitration hearing by the individual Respondents eliminates the union as exclusive bargaining agent under Section 9 (a) of the federal Act. The administration of the bargain in matters involving the entire unit or concerning interpretation is as much the right of the exclusive bargaining agent as is the negotiation of the bargain. **Hughes Tool Co. v. N. L. R. B.**, 147 F. 2d 69, 72-73 (C. A. 5) **enforcing as modified** 56 N. L. R. B. 981. The Wisconsin courts by judgment have imposed individual bargaining on both employer and union. This Court has held that individual bargaining is incompatible with obligations imposed by the federal Act. **J. I. Case Co. v. N. L. R. B.**, 321 U. S. 332, 338; **National Licorice Co. v. N. L. R. B.**, 309 U. S. 350, 358; **N. L. R. B. v. Sands Mfg. Co.**, 307 U. S. 332, 342.[7]

This case involves important questions affecting application of the National Labor Relations Act to over 90% of collective agreements in the United States. The validity

[7] It should be noted that the judgment of the Wisconsin courts not only prohibited activity protected under Section 7 of the federal Act, but has made mandatory conduct prohibited as unfair labor practices under Sections 8 (a) and (5) and 8 (b) (3) of the Act.

of the arbitration process and its stabilizing influence in industrial relations are in serious jeopardy. Widespread industrial conflict can be the only result of the judgment in the court below. State labor policy in patent conflict with federal policy cannot be allowed to defeat the very purpose of Congress in enacting this legislation—to provide a peaceful and orderly means for employers and unions to resolve their mutual problems.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

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APPENDIX "A".

OPINION OF WISCONSIN SUPREME COURT ON MOTION FOR REHEARING.

No. 32.

August Term, 1959.

State of Wisconsin: In Supreme Court.

Henry E. Clark et al.,
Respondents,
v.
Hein-Werner Corp., a Wis. Corporation,
Defendant,
International Ass'n of Machinists, Local 1377, AFL-CIO,
Appellant.

Filed January 5, 1960.

Per Curiam (on motion for rehearing). The brief of the appellant union, in support of its motion for rehearing, contends that federal labor law controls the instant case and not state law, because of the fact that the employer is substantially engaged in interstate commerce. We find it unnecessary to pass on this contention because several of the authorities relied upon in our opinion are federal cases. The United States Supreme Court has not yet spoken on the principal point decided. When it does, we can perceive of no reason why the same policy considerations which are discussed in our original opinion, and which caused us to reach the result we did, should not carry equal weight with that court.

The second point advanced by the union in support of its motion for rehearing is that our original decision interferes with the union's rights derived from the Labor Management Relations Act of 1947, as amended, to be the exclusive collective bargaining agent for the plaintiff employees in matters affecting their seniority rights. In support of such contention **Ford Motor Company v. Huffman** (1953), 345 U. S. 330, 73 Sup. Ct. 330, 99 L. Ed. 1048, is cited. That case dealt with preferential seniority rights of employees, who had been in military service, arising under a collective bargaining contract negotiated by the union as the collective bargaining agent. The argument now advanced seems to be this: Because the union in the first instance could have negotiated a contract with the employer giving the plaintiff employees unfavorable seniority rights, the union can accomplish the same result in the arbitration proceeding.

We deem the foregoing to be a fallacious argument. Once the rights of employees have become fixed in the collective bargaining contract, the union does not possess the right to barter them away before an arbitrator. The cases of **Estes v. Union Terminal Co.** (5th Cir. 1937), 89 Fed. (2d) 768, and **Primakow v. Railway Express Agency** (D. C. Wis. 1943), 56 Fed. Supp. 413, deal with rights arising under the National Railway Labor Act. Those cases hold that employees have vested seniority rights under their collective bargaining contract, which entitle them to notice of, and the right to participate in, an arbitration proceeding instituted to pass on such rights. We do not deem that seniority rights negotiated under the Labor Management Relations Act, and embodied in a collective bargaining contract, should be accorded any lesser protection.

The motion for rehearing is denied without costs.

APPENDIX "B".

OPINION OF WISCONSIN SUPREME COURT.

No. 32.

August Term, 1959.

State of Wisconsin: In Supreme Court.

Henry E. Clark et al., Respondents,

v.

Hein-Werner Corp., a Wis. Corporation, Defendant.

International Ass'n of Machinists, Local 1377, AFL-CIO, Appellant.

Filed November 3, 1959.

Appeal from a judgment of the circuit court for Waukesha County: William E. Gramling, Circuit Judge.

Modified, and as so modified, affirmed.

Action by seventeen employees of the Hein-Werner Corporation to have a labor arbitration award declared null and void and to enjoin the employer corporation and International Association of Machinists, Local 1377, AFL-CIO, from applying such award to the accumulated seniority of the plaintiffs.

The facts were stipulated by counsel for the plaintiffs, the employer, and the union. The employer is a Wisconsin corporation operating a factory in the City of

Waukesha and is engaged in interstate commerce. On October 22, 1956, it entered into a collective-bargaining contract with the union effective from September 18, 1956 to September 18, 1959. There was included in such contract a provision for handling grievances and for final disposition of these grievances by arbitration between the employer and the union.

In September, 1957, a grievance arose concerning the seniority of four employees who had been laid off when certain supervisory employees were demoted from their supervisory positions and transferred back into the bargaining unit. Such supervisory employees had originally held non-supervisory positions in the bargaining unit before they had been promoted to their supervisory positions. The clause in the contract covering seniority read as follows:

> "Seniority. Is an employee's length of service with the company in years, months and days."

The question raised by the grievance was whether such former supervisory employees had continuous seniority measured from the date they had entered the service of the company, or whether there should be excluded from such period of continuous service the time they had spent in their supervisory positions. The company had interpreted and applied the seniority clause in accordance with the first of such two stated alternatives, while the union contended that the latter was the correct interpretation.

The grievance was processed in accordance with the grievance procedure stated in the contract and it ended in arbitration before a single arbitrator. Such arbitrator conducted a hearing in the City of Waukesha, in which both the union and the employer were represented by counsel. The arbitrator received evidence, and heard

witnesses. Counsel presented oral argument and briefs were filed. However, none of the demoted supervisory employees were notified of the time and place of such hearing and none were present or participated in the arbitration proceedings.

On March 10, 1958, the arbitrator made his award in writing. Such award upheld the union's position and, among other things, provided that employees while employed in job classifications outside of the bargaining unit could not accumulate seniority for such period. The award also ordered that the four employees laid off be made whole for any wage loss sustained by reason of the employer giving seniority credit to supervisory employees for time worked outside of the bargaining unit.

Subsequent to the award a meeting of the employees in the bargaining unit was held at which time the award was read and explained. In the words of the stipulation, "A determination at this meeting was had that no change would be made in seniority as set forth in the arbitrator's award." All of the plaintiffs participated in this meeting. The employer proceeded to change the seniority list in accordance with the award, and paid some of the affected employees' back pay in accordance therewith.

There were twenty-nine demoted supervisory employees adversely affected by the award but only seventeen instituted the instant circuit court action. Because the relief sought was equitable in nature, the action was tried to the court without a jury. Judgment in favor of the plaintiffs was rendered February 5, 1958, the material portions of which read as follows:

"It is adjudged and decreed:

"(1) That the Circuit Court of Waukesha County has jurisdiction of the parties and the subject matter before the Court.

"(2) An employee's seniority rights are individual rights belonging to the employee and constitutes such employee's exclusive property.

"(3) That an individual's rights cannot be taken away from such employee without due process of law. That the plaintiffs, in not receiving notice of the arbitration hearing and in not being given the opportunity to participate in said arbitration hearing, did have their individual property rights taken away from them without due process of law.

"(4) That the defendant Company and the defendant Union are restrained and enjoined from enforcing the arbitration award against the plaintiffs."

The defendant union has appealed from such judgment to this court. The plaintiffs have moved for review of the action of the trial court in failing to make a finding that the arbitrator had exceeded his jurisdiction, although such issue was raised by the complaint. The defendant employer has not participated in the appeal.

Currie, J. The seniority rights sought to be protected by the plaintiffs are grounded upon the collective-bargaining contract. Although the employer is engaged in interstate commerce the action does not involve an unfair labor practice under the Labor Management Relations Act of 1947, as amended, and, therefore, the controversy does not fall within the jurisdiction of the National Labor Relations Board. It is a type of action over which state courts and federal courts have concurrent jurisdiction. **McCarroll v. Los Angeles County Dist. Coun. of Car.** (1957), 49 Cal. (2d) 45, 315 Pac. (2d) 322 [certiorari denied, 355 U. S. 932, 78 S. Ct. 413, 2 L. Ed. (2d) 415]; **Steinberg v. Mendel Rosenzweig Fine Furs, Inc.** (1957), 9 Misc. (2d) 611, 167 N. Y. Supp. (2d) 685; **Ingraham Co. v. Local 260, Inter. U. of E., R. & M. Wkrs.** (D. C. Conn. 1959), 171 Fed. Supp. 103.

The plaintiff employees were not parties to the collective bargaining contract and under the grievance procedure set forth therein were given no right to initiate arbitration or to participate in the arbitration once it was set in motion. The instant appeal presents the problem of when, if ever, can judicial protection of the rights of individual employees through the arbitral process be invoked. This is a problem which has greatly troubled the courts and legal writers.[1]

So long as the union is fighting the battle of the employees through the arbitration proceeding the employees' interests are being represented and there is no need for courts to provide protection to the employees. Sound public policy dictates that a court should not interfere with or disturb the orderly working of the arbitration process unless a compelling reason for invoking the court's equitable powers is presented. One of the principal purposes of arbitration is to reach a speedy final result and to avoid protracted litigation.

However, as pointed out in a Comment in 6 U. C. L. A. Law Review (1954), 603, 628, "Often the substantial interests of the individual employee and the union diverge. At this point it is difficult for the union to adequately represent the individual's interest. This may occur when he is a non-union member of the collective-bargaining unit, or he belongs to a minority faction of the union, or he is the 'square peg in the round hole' type, or merely because

[1] Lenhoff, The Effect of Labor Arbitration Clauses Upon the Individual, 9 Arbitration Journal (1954) 3; Isaacson, Labor Arbitration in State Courts, 12 Arbitration Journal (1957) 179, 184; Cox, Rights Under a Labor Agreement, 69 Harvard Law Review (1956) 601; Manson, Labor Relations Law, 32 New York University Law Review (1957) 1365, 1374; Rights of Individual Workers in Union-Management Arbitration Proceedings, 66 Yale Law Journal (1957) 946; Industrial Due Process and Just Cause for Discipline; A Comparative Analysis of the Arbitral and Judicial Decisional Processes, 6 U. C. L. A. Law Review (1959) 603, 628.

the union officials do not believe in his claim." It is in such a situation that some courts have extended judicial protection to the employees whose interests are actually not being represented by the union in the arbitral process. We fully agree with the conclusion of the New York Appellate Division that, "The law upon this subject is still in a state of flux." **Donato v. American Locomotive Co.** (1954), 283 App. Div. 410, 127 N. Y. Supp. (2d) 709, 714, affirmed, 306 N. Y. 966, 120 N. E. (2d) 227.

The New York courts by two recent decisions have made a notable contribution to the progress of the law in coping with this problem of protecting the rights of employees in labor arbitration proceedings whose interests are adverse to the union. **In the Matter of Iroquois Beverage Corp.** (1955), 14 Misc. (2d) 290, 159 N. Y. Supp. (2d) 256, and **Soto v. Lenscraft Optical Corp.** (1958), 7 App. Div. (2d) 1, 180 N. Y. Supp. (2d) 388.

In the **Iroquois Beverage Corp. Case** certain employees sought a court judgment to permit them to intervene in a labor arbitration proceeding over the objections of both the union and the employer. The arbitration had been initiated by the union over seniority rights, as was the case in the instant appeal. In such arbitration the union was championing the cause of thirty-two employees whose interests were adverse to those employees who sought intervention. The court granted such right of intervention and quoted with approval the following dictum appearing in the opinion in **Donato v. American Locomotive Co.**, *supra* (127 N. Y. Supp. (2d) at p. 715):

> "Even if the interested employee has not intervened in the arbitration proceeding, it has been held that he has the right to intervene at a later stage, in the judicial proceeding, and to move to vacate the award, on the ground that he is a person interested in 'the controversy which was arbitrated.' **Busch Jewelry Co.**,

Inc., v. United Retail Employees' Union, Local 830, 170 Misc. 482, 10 N. Y. S. (2d) 519; cf. **Curtis v. New York World-Telegram Corp.**, 282 App. Div. 183, 121 N. Y. S. (2d) 825, *supra*; **Estes v. Union Terminal Co.**, 5 Cir. 89 F. (2d) 768."

The case of **Soto v. Lenscraft Optical Corp.**, *supra*, involved an appeal by the union from a lower court judgment vacating a labor arbitration award because certain employees had been denied the right to appear in such arbitration proceeding by their own counsel. The arbitration had been instituted by the union because the employer had threatened discharge of one hundred twenty-two employees alleged to have engaged in a slowdown. The plaintiff employees who had been denied intervention had made a showing that the union and the employer were in collusion to discriminate against the plaintiffs because of the efforts of another union to organize the plant. The court affirmed the judgment below vacating the award. It held that, while the union has control over the grievance procedures, there must be implied a duty of **fair representation**. In its opinion the court declared [180 N. Y. Supp. (2d) 392]:

> "Whether petitioners be viewed in the nature of third party beneficiaries of a contract or in the position of beneficiaries of a trust, in which the union as a trustee owes them a fiduciary obligation of fair representation (the label is not important), they had cognizable standing to seek a vacature of the award."

The test of fair representation employed by the court in the **Soto Case** is the one advocated by Prof. Cox in his article, "Rights Under a Labor Agreement" in 69 Harvard Law Review (1956), 601, 638:

> "The relationship between law and industrial relations will be improved, and collective bargaining

will work better, in my opinion, without any sacrifice of the interests of individual employees, if contracts which contemplate active administration through a grievance and arbitration procedure controlled by the union are held to vest the power to settle grievances in the collective-bargaining representative, **subject to its fiduciary duty of fair representation.**" (Emphasis supplied.)

We deem such test of fair representation, in determining when to grant court protection to the rights of an individual employee under the collective-bargaining contract, to be sound in principal and we adopt the same. In most situations whether the union is performing its fiduciary duty of fair representation in an arbitration proceeding presents a question of fact. However, where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. This is true even though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable to such a situation.

This court applied the test of fair representation in giving judicial relief to individual employees in **Pattenge v. Wagner Iron Works** (1957), 275 Wis. 495, 82 N. W. (2d) 172. There the court entertained a suit by the employees to recover vacation pay due under a collective-bargaining contract without the union having invoked the grievance procedure, the end step of which was arbitration. The rationale of such holding is stated in the opinion as follows (275 Wis. at p. 500):

"We do not construe the contract or the law as requiring an individual employee to invoke this grievance procedure to assert an accrued pecuniary claim

in circumstances where it is reasonably apparent that the union is hostile to him and will not give him adequate representation. To do so would place the employee's accrued rights against his employer more or less at the mercy of an unfriendly union. Both congress and the Wisconsin legislature have shown solicitude to protect employees from such consequences, by the provisions of the 1947 Federal Labor Management Act, 61 U. S. Stats. at L., p. 143, Sec. (a), and the Wisconsin Employment Peace Act, Sec. 111.05 (1), that any individual employee shall have the right at any time to present grievances to the employer. See discussion and authorities cited in Lenhoff, The Effect of Arbitration Clauses upon the Individual, 9 Arbitration Journal 3, and **Elgin J. & E. R. Co. v. Burley**, 325 U. S. 711, 733, 736, 65 Sup. Ct. 1282, 89 L. Ed. 1886."

Under the holding in **Soto v. Lenscraft Optical Corp.**, *supra*, if the plaintiff employees in the instant case had applied to the arbitrator to intervene in the arbitration proceeding, it would have been his duty to have granted it. Such right of intervention would be valueless, however, if the plaintiffs were not given adequate notice of the arbitration hearing. In view of our holding that there was no fair representation of the plaintiffs by the union at such hearing, to hold that they would be bound by the arbitrator's adverse award contravenes our concept of due process.

While the plaintiff employees had no seniority rights at common law, and such rights were created solely by reason of the labor contract negotiated in their behalf by the union, nevertheless they constitute a valuable property right and cannot be divested without due process of law. **Estes et al. v. Union Terminal Co.** (5th Cir. 1937), 89 Fed. (2d) 768, and **Primakow v. Railway Express Agency** (D. C.

Wis. [1943]), 56 Fed. Supp. 413.[2] It is the contention of the union that no due process problem is present, in holding the award binding upon the plaintiffs' seniority rights, because the plaintiffs were represented by the union in the arbitration proceedings. The leading case on due process as applied to class representation is **Hansberry v. Lee** (1940), 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A. L. R. 741, in which the opinion was written by Mr. Justice (later Chief Justice) Stone. The opinion expressed the conclusion that, where the substantial interests of the representative are not necessarily or even probably the same as those he purports to represent, due process militates vigorously against giving the decision effect upon them.[3] Here the interests of the union espoused in the arbitration were in direct opposition to those of the plaintiffs.

The union advances the further argument that plaintiffs' rights were adequately represented before the arbitrator because the employer's position in the arbitration proceedings was identical to those of the plaintiffs. While such contention might be material on the issue of due process, we deem it to be beside the point on the issue of whether the plaintiffs were entitled to notice of the hearing, and an opportunity to intervene, as a matter of sound labor policy. Employees not fairly represented by the union should never be put in the position of having to

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[2] The brief *amicus curiae* contends that there is no issue of due process under the Fourteenth amendment present because of the absence of any state action, citing *Ross v. Ebert* (1957), 275 Wis. 523, 82 N. W. (2d) 315. However, the case of *Dunphy Boat Corp. v. W. & E. R. R.* (1954), 267 Wis. 316, 64 N. W. (2d) 866, clearly demonstrates that state action is present. This is because, as pointed out therein, The Employment Peace Act (secs. 111.01 to 111.19, Stats.) makes it an unfair labor practice not to carry out the arbitration clause of a collective-bargaining contract. At common law in Wisconsin such an arbitration clause was unenforceable. *Local 1111 v. Allen-Bradley Co.* (1951), 259 Wis. 600, 49 N. W. (2d) 720.

[3] See Lenhoff, Arbitration and the Individual, 9 Arbitration Journal (1954) 3, 22.

solely depend upon the employer championing their rights under the collective-bargaining contract.

We find it unnecessary to ground our holding, that the award should be held not binding upon the plaintiffs because of lack of notice to them of the arbitration hearing, upon lack of due process. Courts of equity traditionally have the power to grant relief in situations which offend the court's sense of justice and fair-play. We are herein confronted with a new situation in which it is incumbent upon us to adopt such rule of law as we deem to be in the best interests of sound public policy. We do not believe that the requiring of the giving of notice, and an opportunity to intervene, to those employees not being fairly represented in the arbitration by the union, as a condition to the award being binding on such employees, will prove disruptive of the arbitration process. We are inclined to believe that in the vast majority of labor arbitration no question of fair representation will ever arise.

We have intentionally avoided discussion of whether the employees' right to fair representation is derived from a theory of agency, third party beneficiary doctrines, or a trustee and cestui relationship. As well stated in 66 Yale Law Review (1957) at page 951, "labor-management relations pose special problems that should be resolved with a view to the needs of contemporary labor policy. In short, whether employees are entitled to protection in union-management arbitrations, and whether participation, a stay or an attack upon the award is the proper remedy should be viewed as questions of labor policy."

In view of our holding that the plaintiffs are not bound by the award because of not having been given proper notice of the arbitration hearing, we do not reach the question raised by the motion for review as to whether the arbitrator exceeded his jurisdiction.

By the Court.—The judgment is modified by striking Paragraph (3) therefrom, and, as so modified, is affirmed.

DISSENTING OPINION OF JUSTICE FAIRCHILD IN THE WISCONSIN SUPREME COURT.

No. 32.

August Term, 1959.

State of Wisconsin: In Supreme Court.

Henry E. Clark et al., Respondents,

v.

Hein-Werner Corp., a Wis. corporation, Defendant,

International Ass'n of Machinists, Local 1377, AFL-CIO, Appellant.

Filed November 3, 1959.

Fairchild, J. (dissenting) A collective bargaining agreement was in effect. It provided for arbitration of unresolved grievances. The parties resorted to arbitration in compliance with the agreement and an award was made. The parties violated no statute. This court now affirms an injunction forbidding enforcement of the award against the plaintiffs.

In my opinion, plaintiffs have shown no grounds for the exercise of the equity powers of a court.

Plaintiffs' complaint attacked the award solely upon the ground that the award exceeded the limits of interpretation of the agreement and therefore did not comply with the contract. Neither the trial court, nor this one, has dealt with that issue.

It appears that the grievance concerning the seniority of employees who had been employed both within and

without the bargaining unit arose in September, 1957. The parties stipulated that on September 19th, the union committee called a meeting of the employees in the bargaining unit and that a majority voted to arbitrate the grievance. A number of plaintiffs were present. The hearing before the arbitrator was held October 30th, and the award was made March 10, 1958. The award was read to a subsequent union meeting in the bargaining unit. There is no claim that any plaintiff made any effort to intervene and present his arguments before the arbitrator, or that the company or union prevented or made it difficult for plaintiffs to attempt to intervene. The position now taken by this court is that at some point in the arbitration, the union or the company had the duty of serving notice of hearing upon plaintiffs if they wished the award to be binding upon plaintiffs.

The present action was commenced June 27, 1958, after a dispute arose between the union and the company over the employer's compliance with the award, and after an unfair labor practice charge was filed against the employer by the union. As stated above, the complaint did not raise the issue of lack of notice.

There is no claim that the employer failed to make a vigorous presentation of all reasonable contentions favorable to plaintiffs, and the statement accompanying the arbitrator's award indicates that the employer presented full arguments and briefs in support of its position.

We have no right to impose upon labor arbitrations a new procedural requirement (which turns out to be jurisdictional, in effect) merely because we "deem (it) to be in the best interests of sound public policy." That is legislation.

Plaintiffs have not shown that advantage has been taken of them by unconscionable conduct.

APPENDIX "C".

OPINION OF CIRCUIT COURT OF WAUKESHA COUNTY.

State of Wisconsin, Circuit Court, Waukesha County.

Henry E. Clark, Edwin Wegner, Ralph N. Lingerbach, Jack W. Cadieu, Henry Buege, Howard L. Roberts, Gordon W. Maxwell, Erwin R. Lee, Anthony J. Padwin, W. C. Melzer, Stanley S. Struck, Harvey E. Knippel, Karl Pfaehler, Clyde W. Beckman, Fred Walther, Ralph J. Sumpter, Wallace S. Hill and Darwin Burnett, Plaintiffs, vs. Hein-Werner Corporation, a Wisconsin corporation, and International Association of Machinists, Local 1377, AFL-CIO, Defendants.	February, 1958. Term. Decided February 5, 1959.

The defendant union is a voluntary unincorporated association commonly referred to as a labor union, whose principal office is in the City of Waukesha. The Hein-Werner Corporation is a Wisconsin Corporation engaged in manufacturing, and is engaged in interstate commerce. The plaintiffs are all employees of the Hein-Werner Corporation.

In October of 1956 the union and the company entered into a collective bargaining contract running until Sep-

tember of 1959, wherein and whereby various rules concerning wages, hours and working conditions at the Hein Werner Company were set forth in a collective bargaining agreement. The union is the bargaining agent for all production and maintenance employees, excluding clerical help, supervisory help and setup men. The collective bargaining agreement in effect during the time of this controversy provides in Article 17.0 as follows:

> "Seniority is an employee's length of service with the company in years, months and days."

In 1957 certain men were transferred from setup and or supervisory jobs to job classifications in the bargaining unit, and were simultaneously credited with seniority for the entire time they had been working for the company. In September of 1957 the union filed a grievance, asking in effect that the company rearrange the seniority list by not crediting to employees the time spent on job classifications outside of the bargaining unit. The dispute was processed through a grievance procedure as set forth in the bargaining agreement, but the dispute was not resolved. The company and the union then, in accordance with the grievance procedure, chose an arbitrator to resolve the grievance. Hearings were held and the award of the arbitrator was rendered on March 10, 1958. A dispute arose between the company and the union with respect to other employees and their claims for damages arising out of the award. Other pertinent facts will be mentioned as necessary.

The union challenges the jurisdiction of this Court. However, the Court feels that the Allen Bradley case, 259 Wis. 609, the dissenting opinion of which is apparently now the law as shown by Lincoln Mills v. Textile Workers, 230 Fed. 2nd 81, indicates that our Supreme Court recognizes that the Circuit Court has supervisory function over arbitration matters.

The present controversy is between various members of the union and the union itself. The original controversy was also between a minority in the union and the majority, and not a controversy between the union and the company.

Counsel for the union strongly urge that the plaintiffs were not parties to the arbitration, and therefore may not collaterally attack it. However, the Primakow v. Railway Express Agency case, 56 Fed. Supp. 413, clearly makes the plaintiffs parties, although not named as such. It would appear here that the majority of the union outvoted the minority, and then presented to the arbitrator the majority opinion which was in sharp conflict to the rights of the minority. The union finds itself in the position of representing the majority viewpoint, to the detriment of the minority. There is no showing here that the minority, who actually were parties to the dispute, were ever given notice of the proceedings, except perhaps a discussion at a union meeting, which does not constitute notice. In other words, although certain rights were taken from the minority, never have they had their opportunity to be heard.

It is basic, and our Courts have held that seniority is a property right. Primakow v. Railway Express Agency, 56 Fed. Supp. 413, states:

> "An employee's seniority rights, though arising under collective bargaining agreement between employee's union and employer, are individual employee's exclusive property and constitute property within the Fifth Amendment."

Pattenge v. Wagner Iron Works, 275 Wis. 495, is authority for an individual employee to sue his employer on a specific money claim which has accrued to him under the terms of a collective bargaining contract between the employer and a union in the absence of something in such

contract precluding him from doing so. If, as stated above, an employee's seniority rights are the individual employee's exclusive property, and constitute property within the Fifth Amendment, then he should have just as much opportunity to protect those rights as he should to pursue a money claim. While the Primakow case involves a dispute under the Railway Labor Act, this quote is pertinent:

> "No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the board. It is not necessary for an employee to be named as a party to the proceeding before the board to be involved in the controversy within the meaning of the law * * * notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the board unless notice is waived."

It cannot be contended here that the union was representing the plaintiffs who are also members of the union at the arbitration hearing, as the position taken by the union was in sharp conflict to the interests of the individual plaintiffs. To say as the union does, that these individual plaintiffs have no remedy after the arbitration award, is to say that a minority can have no protection from the majority.

In Nord v. Griffin, 86 Fed. 2nd 481, wherein the Circuit Court of Appeals of the 7th Circuit also held that the right to seniority is a property right, that Court quotes from Ochoa v. Hernandez Morales, 230 U. S. 139:

> "Whatever else may be uncertain about the definition of the term 'due process of law' all authorities

agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure and without notice or an opportunity for hearing."

This is much the situation here.

In the Opinion of the Court the plaintiffs were parties in interest in the controversy submitted to the arbitrator, and were given no right to participate in the proceedings. Until such time as they are given the right to participate, an award given in their absence and without notice to them cannot be binding upon them.

Judgment may be entered accordingly.

Dated this 5th day of February, 1959, at Waukesha, Wisconsin.

By the Court:

William E. Gramling,
Circuit Judge.

JUDGMENT OF WAUKESHA COUNTY CIRCUIT COURT.

State of Wisconsin: Circuit Court: Waukesha County.

Henry E. Clark, Edwin Wegner, Ralph N. Lingerbach, Jack W. Cadieu, Henry Buege, Howard L. Roberts, Gordon W. Maxwell, Erwin R. Lee, Anthony J. Padwin, W. C. Melzer, Stanley S. Struck, Harvey E. Knippel, Karl Pfaehler, Clyde W. Beckman, Fred Walther, Ralph J. Sumpter, Wallace S. Hill and Darwin Burnett.	February, 1958 Term.
Plaintiffs.	Filed, March 17, 1959
vs.	
Hein-Werner Corporation, a Wisconsin corporation, and International Association of Machinists, Local 1377, AFL-CIO.	
Defendants.	

This action having been brought on for trial on the 19th day of September, 1958, at the regular February term 1958, of this Court before the Honorable William E. Gramling, Judge of said Court and the Court having filed its Findings of Fact and Conclusions of Law from which it satisfactorily appears and wherein the Court finds that the plaintiff is entitled to a Judgment.

Now on motion of John H. Wessel, plaintiffs' attorney,

It Is Adjudged and Decreed:

1. That the Circuit Court of Waukesha County has jurisdiction of the parties and the subject matter before the Court.

2. An employee's seniority rights are individual rights belonging to the employee and constitutes such employee's exclusive property.

3. That an individual's rights cannot be taken away from such employee without due process of law. That the plaintiffs, in not receiving notice of the arbitration hearing and in not being given the opportunity to participate in said arbitration hearing, did have their individual property rights taken away from them without due process of law.

4. That the defendant Company and the defendant Union are restrained and enjoined from enforcing the arbitration award against the plaintiffs.

5. That the plaintiffs are hereby granted Judgment with costs and disbursements of this action, in the sum of $159.30.

March 17, 1959.

By the Court:

William E. Grandling.

APPENDIX "D".

ARTICLE I, SECTION 8.

The Congress shall have power

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy:

To make rules for the government and regulation of the land and naval forces:

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions:

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties

made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives beforementioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any officer or public trust under the United States.